

PADAM SINGH

v.

STATE OF U.P.

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NOVEMBER 30, 1999

[G.B. PATTANAIK AND M.B. SHAH, JJ.]

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Penal Code—Sections 302, 307, 148, 452, 324, read with 149—Appellant convicted for the murder of one 'H' causing gunshot injuries—Finding of Sessions Court and High Court based on inimical eye witnesses—No independent witness—Occurrence in broad daylight—Death of three men of accused party unexplained—Held, prosecution failed to establish guilt of the accused beyond reasonable doubt—Conviction and sentence set aside.

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Practice and Procedure—Criminal Appeal—Appellant convicted for murder by Sessions Court—Division Bench divided over the conclusion—Matter referred to a third judge—Third judge affirming the Judgment of conviction without discussing the trustworthiness of witnesses—Held, appellate court, like the trial court has to be satisfied affirmatively before upholding a conviction.

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The Appellant along with a co-accused 'D' were tried for offences under Sections 302, 307, 452, 148, 324 read with 149 IPC, for causing the murder of one 'H'. The prosecution alleged that the Petitioners along with five to six others entered the house of PW1 and started firing, due to which H died. It was further alleged that firing continued from both sides, that accused entered into the house of PW1 searching for his father and when PW1's wife-PW4 tried to stop them she was assaulted by the Petitioner and that when PW3 started firing from the house of 'S' the accused escaped through a side lane.

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Bodies of accused party were recovered from the verandah of the house of PW1 alongwith the body of H. While trying to chase the accused, PW1 alongwith others found a dead body at a distance of four furlongs from his house. A charge sheet was filed only in respect of Petitioner and deceased DI. The Prosecution examined eleven witnesses including four eyewitnesses viz., PWs 1-4. The Sessions Court relying upon the evidence of the eyewitnesses held that accused 'D' and the Petitioner alongwith others entered the house of PW1 and committed the murder of H, convicted and sentenced

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A the accused to undergo life imprisonment.

Appeals were filed by both the accused before the High Court, but accused 'D' died during the pendency of his appeal. The appeal filed by the Petitioner was heard by a Division Bench consisting of Justice G.P. Mathur and Justice Kundan Singh. Justice G.P. Mathur came to the conclusion that

B the prosecution has failed to establish its case beyond reasonable doubt against the Petitioner and that he is entitled to benefit of doubt, that the very fact that the prosecution party has not explained as to how three of the accused persons died, including one unknown person, the prosecution case becomes doubtful and the veracity of the prosecution version becomes doubtful. He
C further held that in view of admitted enmity between the parties and admittedly all the eye witnesses being inimical the prosecution must have examined some independent witness. Justice Kundan Singh differed from the conclusions of Justice Mathur, and *inter-alia* held that alleged omissions and contradictions of the four eye witnesses cannot be held to be material omissions, that non-examination of independent persons cannot be a ground to discard the evidence
D of eyewitnesses in the absence of any infirmity in the evidence and held that the prosecution case must be held to have been established beyond reasonable doubt. When the matter was placed before the third Judge, Justice Malviya, relying upon the sole testimony of PW4 wife of PW1, held that prosecution case has been conclusively proved, beyond reasonable doubt and agreed with
E the conclusion of Justice Kundan Singh.

In appeal to this Court, the Appellant contended that there is not an iota of explanation as to how the dead body of one unknown accused person could be found at a distance of four furlongs and when the prosecution has not offered any explanation for the same, the entire prosecution case must fail, that the

F fact that there has been no seizure of blood-stained earth from the place of occurrence, would establish the defence version that the incident never happened inside the house of PW1 as alleged by PWs 1 to 4 and consequently no reliance can be placed on them, that the investigation is so perfunctory and laconic that there has not been a single panch witness examined and even the Investigating Officer himself has not signed the seizure list as admitted in his evidence, that each of the contradictions and omissions relied upon by Justice Mathur makes the evidence of four eyewitnesses vulnerable and therefore no reliance could have been placed on those testimonies to establish a charge of murder, and that it is highly unnatural that the occurrence took place inside the village in broad day light and not a single independent witness
G was examined by prosecution.

The Respondent-State contended that two Judges of the High Court having agreed with the conclusion of the Sessions Judge, the Prosecution case must be held to have been proved beyond reasonable doubt and the same should not be interfered with by this court. A

Allowing the Appeal, the Court B

HELD : 1. The prosecution evidence, except indicating that R was also firing, there is not an iota of material, indicating, how the three people belonging to the accused party died. It is too well settled that when the prosecution does not explain the injury sustained by the accused at about the time of the occurrence or in the course of occurrence, the Court can draw the inference that the prosecution has suppressed the genesis and origin of the occurrence and has thus, not presented the true version. It is also well settled, where the evidence consists of interested or inimical witnesses, then, non—explanation of the injury on the accused by the prosecution assumes greater importance. Adjudged from the aforesaid stand point and in the absence of any explanation as to how three of the people belonging of the accused party died, the testimonies of PWs 1, 2, 3, and 4 become vulnerable and the accused is entitled to benefit of doubt. [67-G-H; 68-A-B] C

2. That the prosecution witnesses and accused persons are inimical to each other is apparent from the evidence of the four eye witnesses. It has also been elicited from the cross-examination of the eye-witnesses that while the accused persons were running away and the prosecution witnesses were chasing, there had been no assault by the prosecution party nor had there been any firing from them. If that be so and according to the medical evidence, the unknown male person died on receiving multiple gun shot ante-mortem injuries and he must have died an instantaneous death, then obviously, the fact that the dead body was found at a distance of four furlongs would establish that the prosecution case, as unfolded through the evidence of PWs 1 to 4 is not true and the true version is not coming forward. On this ground alone, the accused is entitled to the benefit of being acquitted. [68-B, C, D] D

3. The conclusion reached by two Judges that the omissions and contradictions in the evidence of witnesses are not material, cannot be sustained. In the opinion of the Court, the witnesses do not stand the test of stricter scrutiny, they being admittedly inimical towards the accused persons. In this view of the matter, no reliance could have been placed on their testimony and as such the conviction of the Appellant cannot be sustained. [68-E-F] G

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A 4. The contention of the appellant that the fact that there had been firing at the place of occurrence has not been established by the prosecution witnesses, is upheld. In the teeth of the material brought out in the cross-examination of the Investigating Officer and in view of the fact that the interested witnesses have been held to be unreliable, and that the prosecution has offered no explanation as to how three people belonging to the accused party died, the conviction of the Appellant is set aside and he is acquitted of the charges levelled against him. [68-G; 69-B-C]

B 5. It is the duty of an appellate court to look into the evidence adduced in the case and arrive at an independent conclusion as to whether the said evidence can be relied upon or not and even if it can be relied upon, then whether the prosecution can be said to have been proved beyond reasonable doubt on the said evidence. The credibility of a witness has to be adjudged by the appellate court in drawing inference from proved and admitted facts. It must be remembered that the appellate court like the trial court has to be satisfied affirmatively that the prosecution case is substantially true and the guilt of the accused has been proved beyond all reasonable doubts as the presumption of innocence with which the accused starts, continues right through until he is held guilty by the final Court of appeal and that presumption neither strengthened by an acquittal nor weakened by a conviction in the trial Court. The judicial approach in dealing with the case where an accused is charged of murder under Section 302 has to be cautious, circumspect and careful and the High Court, therefore, has to consider the matter carefully and examine all relevant and material circumstances, before upholding conviction. [66-B, C, D]

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CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 679
F of 1997.

From the Judgment and Order dated 20.12.96 of the Allahabad High Court in Crl. A. No. 2421 of 1980.

G U.N. Bachawat, Sushil Kumar Jain, Ms. Madhurima Tatia and A. Mishra for the Appellant.

Anis Ahmad Khan for A.S. Pundir for the Respondent.

The Judgment of the Court was delivered by

H PATTANAIK, J. The appellant Padam Singh and his co-accused Desh Raj were convicted by the Sessions Judge, Bulandshahar in Sessions Trial

No. 260 of 1980 for the offence under Sections 302, 307, 452, 148, 324 read with Sec. 149 IPC and were sentenced to imprisonment for life for their conviction under Section 302 and other sentences for other offences with the direction that the sentences would run concurrently. Both of them preferred appeals to the High Court but co-accused Desh Raj, died during the pendency of his appeal and, therefore his appeal stood abated. The appeal filed by appellant—Padam Singh was heard by a Bench of Hon'ble Justice G.P. Mathur and Hon'ble Justice Kundan Singh. Hon'ble Justice Mathur, came to the conclusion that the prosecution has failed to establish its case beyond reasonable doubt against the accused appellant and, therefore, he is entitled to benefit of doubt. Justice Kundan Singh however disagreed with the conclusion of Hon'ble Justice Mathur and came to the conclusion that the prosecution has been able to prove its case successfully with reliable and convincing evidence beyond reasonable shadow of doubt and as such, dismissed the appeal. In view of difference of opinion between the two learned Judges, the appeal was placed before Hon'ble Justice Giridhar Malviya, who agreed with Hon'ble Justice Kundan Singh and dismissed the appeal. Ultimately, therefore by majority of two as to one, the appeal of the appellant stood dismissed by the High Court and hence the present appeal.

The prosecution case in nut-shell is that Ved Ram lodged the First Information Report, alleging that on 28.9.79 at 6 A.M., while he was lying on a cot in the verandah of his Baithak and deceased Hari Singh was lying on another cot, both were talking to each other, accused Padam Singh, Desh Raj, Lekh Raj and five to six others, entered into the house from the main gate and Desh Raj fired from his gun which hit Hari Singh. Ved Ram rushed inside his Baithak and closed the door and he also fired from the said Baithak. Firing from both sides continued for a long period. The accused-assailants then searched for Ved Ram's father and when his wife Vimlesh tried to stop them, she was assaulted by Padam Singh with Farsa. The assailants then climbed over the roof. By this time, PW3, Raghuraj Singh had taken position on the roof of the house of Sher Singh and he started firing from there. The accused-assailants, then broke open the wall of the room and went over the roof and escaped through the side lane. Raghuraj Singh then shouted that the assailants had run away and then Ved Ram PW1 came out of his Baithak and saw that Hari Singh was lying dead. He also saw one of the assailants Munshi was lying dead. Even the body of Lekh Raj was also found there. PW1 and others tried to chase the accused persons but could not catch hold of them. They further found the dead body of another unknown person at a distance of four furlongs. The prosecution party then came back and lodged the report at 8.30

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- A. A.M. in the Police Station, which was at a distance of eight kilometers. On the basis of the aforesaid F.I.R. PW5, Sub-Inspector of Police of Police Station Kakore, commenced investigation. He held inquest over the dead body of Hari Singh as well on the dead bodies of Lekh Raj and Munshi. Certain arms and ammunitions were also found near the dead bodies of Munshi and Lekh Raj, which were seized. He went a distance of four furlongs, where the dead body of the unknown person was lying and held inquest over the same. The investigation was then taken over by Uma Shanker Singh, who ultimately completed the investigation and submitted the charge-sheet against the two accused persons namely Desh Raj and Padam Singh and on being committed, the accused persons stood their trial in respect of the charges as already started.
- C. The prosecution examined eleven witnesses, including four eye witnesses PWs 1, 2, 3, and 4. The learned Sessions Judge relied upon the testimony of the aforesaid four eye witnesses and came to hold that the accused Desh Raj, Padam Singh along with others entered into the house of PW1 and committed the murder of Hari Singh and convicted them accordingly.
- D. On the basis of the evidence of Doctor PW6; who had conducted the autopsy on the dead body of the deceased Hari Singh, the learned Sessions Judge found that the death was on account of shock and haemorrhage as a result of three ante-mortem injuries and all the injuries on the person of deceased Hari Singh were gun shot injuries. In appeal, Justice Mathur on an analysis of the entire evidence on record came to the conclusion that the very fact that prosecution party has not explained as to how three of the accused persons died, including one unknown person, whose dead body was found, four furlongs away from the place of occurrence, the prosecution case becomes doubtful and the veracity of the prosecution version becomes doubtful. Hon'ble Justice Mathur also came to the conclusion that in view of admitted enmity between the parties and admittedly, all the eye witnesses PWs 1 to 4 being inimical, when the occurrence took place at 6 A.M., it is reasonable to expect that some independent persons must have seen the occurrence, more so when the firing from both sides continued for about one hour but none of them has been examined by the prosecution. The learned Judge was of the opinion that though the accused persons came to kill Ved Ram or his father Saheb Singh and had no motive to commit the murder of Hari Sing, yet Hari Singh was killed by a gun shot injury and neither Ved Ram nor father received a single scratch of injury and this fact creates doubt with regard to the origin and genesis of the prosecution case. It is significant to notice that though as many as three persons from the accused side were found dead but the investigation never proceeded against their death to find out as to how they were killed and the Investigating Officer in his evidence categorically

admitted that he had never focussed his attention in that respect. Justice Mathur, also while appreciating the trust-worthiness of the four eye witnesses noticed the omissions and contradictions in their statement in Court from their earlier statement recorded under Sec. 161 and was of the opinion that by no stretch of imagination the witnesses can be held to be wholly truthful witnesses. With these conclusions, the learned Judge recorded the order of acquittal. Justice Kundan Singh, while differing from the conclusion of Justice Mathur, was of the opinion that the alleged omissions and contradictions of the four eye witnesses cannot be held to be material omissions, amounting to contradictions and therefore their evidence cannot be brushed aside on that ground. He further held that merely because the witnesses are inimical is not a ground to discard their testimony. So far as the non-explanation of the prosecution as to how three of the accused persons were found dead, he was of the opinion that since Raghuraj Singh was also firing shots from his gun from the roof top, the accused persons might have been killed and further while chasing the accused persons, the unknown person might have received the injury and died and consequently, it cannot be said that the prosecution has not explained as to how three of the accused party died. According to him, merely because independent persons have not been examined and the witnesses are interested witnesses but in the absence of any infirmity in their evidence, the said evidence cannot be thrown out. The learned Judge was of the opinion that the general tendency of the people in our country being to avoid litigation or to involve themselves of being a witness to an incident, the Court must examine the veracity of the evidence on record to come to its own conclusion. According to learned Judge, while appreciating the evidence, the Court must also bear in mind the innocence and rustic persons hailing from rural areas, when deposed about certain state of affairs, they are not aware of the necessity of law or legal contentions, which may be raised in Courts. According to the learned Judge when the occurrence has taken place in broad day light and there has been no lack of opportunity in identifying the accused persons, the evidence of PWs 1 to 4 is sufficient to bring home the charge and, therefore, the prosecution case must be held to have been established beyond reasonable doubt. When the matter was placed before third learned Judge viz. Justice Malviya, he, instead of appreciating the evidence, as a Court of appeal would do, merely stated the conclusion of the two learned Judges, who originally heard the appeal and differed from each other and then he agreed with the conclusion of Hon'ble Mr. Justice Kundan Singh, solely relying upon the evidence of PW4. Vimlesh, who was also attacked by Padam Singh and who sustained the two injuries which could be caused by blunt weapon. Mr. Justice Malviya, apart from the fact that, he did

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- A not discuss the trustworthiness of the four eye witnesses, even has not discussed the reasoning, advanced by Hon'ble Justice Mathur in not placing reliance on the inimical evidence of PWs 1 to 4. A bare reading of the judgment of Justice Malviya would indicate that he has failed to discharge his duty and obligation as an appellate Court, in appreciating the evidence and coming to its conclusion one way or the other. It is the duty of an appellate Court to look into the evidence adduced in the case and arrive at an independent conclusion as to whether the said evidence can be relied upon or not and even if it can be relied upon, then whether the prosecution can be said to have been proved beyond reasonable doubt on the said evidence. The credibility of a witness has to be adjudged by the appellate
- B Court in drawing inference from proved and admitted facts. It must be remembered that the appellate Court like the trial Court has to be satisfied affirmatively that the prosecution case is substantially true and the guilt of the accused has been proved beyond all reasonable doubts as the presumption of innocence with which the accused starts, continues right through until he is held guilty by the final court of appeal and that presumption is neither strengthened by an acquittal nor weakened by a conviction in the trial court. The judicial approach in dealing with the case where an accused is charged of murder under Section 302 has to be cautious, circumspect and careful and the High Court, therefore, has to consider the matter carefully and examine all relevant and material circumstances, before upholding conviction.

- E At the outset we must observe that neither Justice Kundan Singh nor Justice Malviya have acted in accordance with the aforesaid parameters and the duties of a Court of appeal, while considering the legality of conviction recorded by the Sessions Judge. Mr. Bachawat, the learned Senior Counsel, appearing for the appellant, Padam Singh, seriously contended that there is
- F not an iota of explanation as to how the dead body of one unknown accused person could be found at a distance of four furlongs and when the prosecution has not offered any explanation for the same, the entire prosecution case must fail inasmuch as the manner in which the incident happened, as unfolded through the evidence of PWs 1 to 4 cannot be said to be a true version. Mr.
- G Bachawat, also further contended that the very fact that there has been no seizure of blood-stained earth from the place of occurrence, would establish defence version that the incident never happened inside the house of PW1, as alleged to by the witnesses 1 to 4 and consequently, no reliance can be placed on their testimony. Mr. Bachawat, also seriously commented upon the fact that the investigation is so perfunctory and lacunic that there has not
- H been a single Panch witness examined and even the Investigating Officer

himself has not signed the seizure list, as is admitted in his evidence. The learned Senior Counsel, also submitted that each of the contradictions and omissions relied upon by Justice Mathur in his Judgment between the statement in the Court and the statement recorded under Sec. 161 makes the evidence of the four eye witnesses vulnerable and, therefore, no reliance could have been placed on those testimonies to establish a charge of murder. Lastly, the learned counsel urged that it is highly unnatural that the occurrence is taking place inside the village in broad day light and only inimical witnesses would be examined and not a single independent witness, and this creates doubt about the prosecution case.

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The learned Counsel, appearing for the State, on the other hand contended that the two learned Judges of the High Court having agreed with the conclusion of the learned Sessions Judge and having found that accused Padam Singh along with other accused persons entered into the house of PW1 and then on account of gun shot firing from Desh Raj, Hari Singh died, the prosecution case must be held to have been proved beyond reasonable doubt and the same should not be interfered with by this Court.

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As has been started earlier, it has been noticed by us that the Judgments of Hon'ble Justice Kundan Singh as well as Hon'ble Justice Malviya, suffered from the infirmity that the learned Judges have not appreciated the veracity of the four eye witnesses and have not come to their conclusion on appreciation of the evidence on record. This approach of the learned Judges, while coming to the ultimate conclusion that the prosecution case has been proved beyond reasonable doubt has forced us to examine the evidence of the four eye witnesses and to find out whether there is any substance in the contention of Mr. Bachawat that the prosecution story, as unfolded through these witnesses is not true. It is in this context that even though the deceased Hari Singh belonging to the prosecution party died and three of the accused persons viz. Lekh Raj, Munshi and another unknown person, were found dead, but the prosecution evidence is totally silent as to how these three people died. That Lekh Raj, Munshi and the unknown person died in course of the occurrence is established beyond reasonable doubt. The prosecution evidence, excepting, indicating that Raghuraj was also firing, there is not an iota of material, indicating, how the three people belonging to the accused party died. It is too well settled that when the prosecution does not explain the injury sustained by the accused at about the time of the occurrence or in the course of occurrence, the Court can draw the inference that the prosecution has suppressed the genesis and origin of the occurrence and has

- A thus, not presented the true version. It is also well settled, where the evidence consists of interested or inimical witnesses, then, non-explanation of the injury on the accused by the prosecution assumes greater importance. Adjudged from the aforesaid stand point and in the absence of any explanation as to how three of the people belonging to the accused party died, the testimonies of PWs 1, 2, 3 and 4 become vulnerable and the accused is entitled to benefit of doubt. That prosecution witnesses and accused persons are inimical to each other is apparent from the evidence of the four eye witnesses. It has also been elicited from the cross-examination of the eye-witnesses that while the accused persons were running away and the prosecution witnesses were chasing, there had been no assault by the prosecution party nor had there been any firing from them. If that be so and according to the medical evidence, the unknown male persons died on receiving multiple gun shot ante- mortem injuries and he must have died in instantaneous death, then obviously, the fact that the dead body was found at a distance of four furlongs would establish that the prosecution case, as unfolded through the evidence of PWs 1 to 4 is not true and the true version is not coming forward. On this ground alone, the accused is entitled to the benefit of being acquitted.

Even, if we examine the intrinsic oath of the prosecution witnesses, who are admittedly inimical, the omissions and contradictions between the statement made under Sec. 161 and the statement made in Court, as brought out in the cross-examination, makes the witnesses unreliable and the two learned Judges, without noticing the same have just brushed aside on the ground that the omissions and contradictions are not material. The said conclusion in our opinion, cannot be sustained. After going through the cross-examination of the aforesaid witnesses, in our opinion, the witnesses do not stand the test of stricter scrutiny, they being admittedly inimical towards the accused persons. In this view of the matter, no reliance could have been placed on their testimony and as such the conviction of the appellant cannot be sustained.

We also find ample force in the argument of Mr. Bachawat that the fact G that there had been firing at the place of occurrence, has not been established by the prosecution witnesses. The reading of the evidence of the Investigating Officer PW5 gives an interesting picture when he states that blood stained soil and control had been taken from the place of occurrence and sealed separately but no witness to the seizure has been examined. According to him, on the way to Saragpur, though a dead body was found and H panchayatnama of the dead body was prepared, but no panch had been

examined. He further candidly admitted that the pellet marks which were found on the wall, were not shown in the site plan. In his cross-examination, he categorically stated that "I had not conducted any investigation as to who killed Munshi Singh, Lekh Raj and the unknown person". He also further admitted that he did not sign on the labels of the bundles, which were sealed. In the teeth of the aforesaid materials, brought out in the cross-examination of the Investigating Officer and in view of the fact that we have already held the interested witnesses to be unreliable and that the prosecution has offered no explanation, as to how three people belonging to the accused party died, it is difficult for us to sustain the conviction of the appellant. We, accordingly, set aside the impugned conviction and sentence of the appellant and acquit him of the charges levelled against him. He may be set at liberty forthwith, C unless, required in any other case. B A

V.M.

Appeal allowed.